IN THE

Supreme Court of the United States

October Term 1966

No. 724

FRANK A. DUSCH, et al.,

Appellants,

v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D. SCULLY and HOWARD W. MARTIN,

Appellees.

On Appeal From The United States Court Of Appeals For The Fourth Circuit

---

MOTION TO DISMISS OR AFFIRM

Henry E. Howell, Jr.,
Howell, Anninos & Daugherty
806 Maritime Tower
Norfolk, Virginia 23510,
Counsel for Appellees

[illegible]

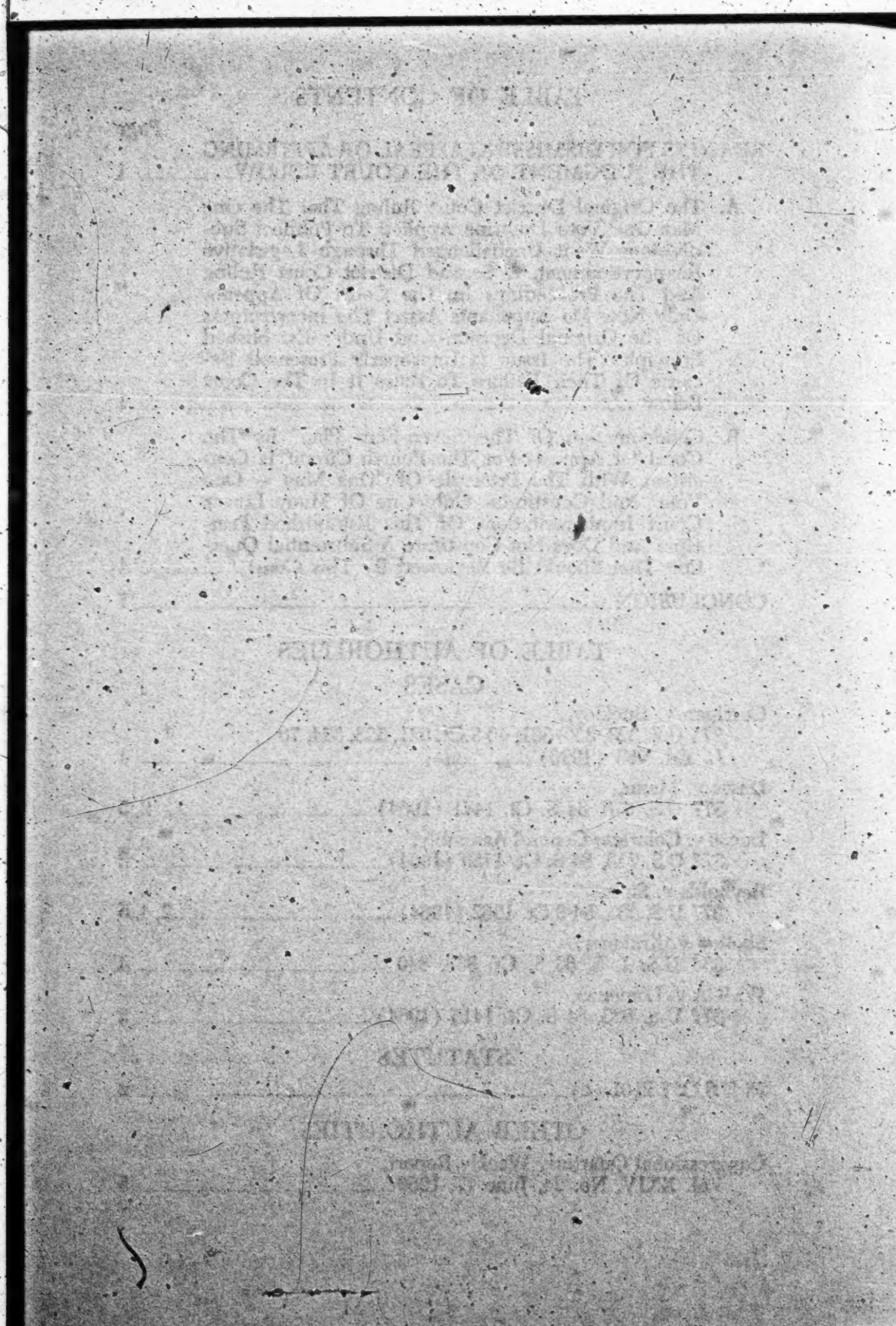
TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES



IN THE

Supreme Court of the United States

October Term 1966

No. 724

FRANK A. DUSCH, et al.,

Appellants,

v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D. SCULLY and HOWARD W. MARTIN,

Appellees.

On Appeal From The United States Court Of Appeals For The Fourth Circuit

---

MOTION TO DISMISS OR AFFIRM

REASONS FOR DISMISSING APPEAL OR AFFIRMING THE JUDGMENT OF THE COURT BELOW

A. The Original District Court Ruling That The One Man-One Vote Doctrine Applied To Political Subdivisions Went Unchallenged Through Legislative Reapportionment, A Second District Court Ruling And The Proceedings In The Court Of Appeals. Only Now Do Appellants Assert The Incorrectness Of The Original Decision And Under Established Principles The Issue Is Improperly Presented Because Of Their Failure To Raise It In The Court Below.

The first and principal point raised by appellants' appeal is the applicability of the doctrine of "One Man — One Vote" to local government. An appeal involving this issue is not timely taken or properly raised.[1]

Appellees, residents and voters of the four most populous boroughs of the City of Virginia Beach and hereinafter referred to as "VOTERS", filed their complaint to reapportion their City Council in compliance with the principle of "One Man — One Vote".[2]

This case was heard concurrently with a similar complaint brought by citizens of the adjacent City of Chesapeake, Virginia.

In a Memorandum Opinion dated December 7, 1965, District Judge Walter E. Hoffman held that the principle of "One Man — One Vote" was applicable to local government and declared the Councils of the City of Virginia Beach and the City of Chesapeake to be malapportioned. (Appellants' App. 21).

The District Court gave each city involved the option of going to the General Assembly and seeking charter changes that would correct the malapportionment then existing, or submit to a Court Order requiring elections on an at large basis.

---

[1] 28 U.S.C. §2101 (c):

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

[2] *Davis v. Mann*, 377 U.S. 678, 84 S.Ct. 1441 (1964); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713, 84 S. Ct. 1459 (1964); *WMCA v. Lomenzo*, 377 U.S. 633, 84 S. Ct. 1418 (1964).

An Order was entered on this opinion on December 7, 1965.[3] No appeal was noted from this Order and appellants accepted the terms of this Order that the principle of "One Man — One Vote" was applicable to the City of Virginia Beach and went to the General Assembly pursuant to the terms of the order and obtained a Charter change known as the "Seven-Four Plan".[4]

The neighboring city involved in the consolidated hearing amended its Charter to provide for at large elections for members of its Council.

"VOTERS", as provided in the District Court's decree of December 7, 1965, filed a supplementary complaint contesting the constitutionality of the "Seven-Four Plan", which plan was designed to preserve rural representation by providing residential councilmen from boroughs containing populations that continued to be flagrantly disproportionate.[5]

---

[3] For reasons stated in a memorandum this day filed, the further proceedings in these cases are stayed and the matters are continued until March 14, 1966, at which time further proceedings may be had on motion of any party in interest.
The Clerk will forward copies of the memorandum and certified copies of this order to counsel of record.

(Signed) Walter E. Hoffman
United States District Judge

[4] As a matter of legislative comity, the Charter changes bearing the unanimous endorsement of City officials are routinely granted by the Virginia General Assembly.

Residential Representation On Council	District Or Borough	Population Per District	Estimated Population Per District (1/1/64)
1	Blackwater	733	862
1	Pungo	2,504	2,806
1	Princess Anne	7,211	7,957
1	Kempsville	13,900	22,254
1	Lynnhaven	23,731	37,760
1	Bayside	29,048	36,027
1	Virginia Beach	8,091	10,473
4	Councilmen Elected At Large		

Appellants did not plead or brief the issue now being raised regarding the applicability of "One Man — One Vote" in the District Court hearing on "VOTERS' " supplementary complaint or on appeal before the Court of Appeals for the Fourth Circuit.[6]

The issue of the applicability of "One Man — One Vote" to this case was settled by the District Court Order of December 7, 1965, which was not appealed and the issue not having been presented to the Court of Appeals for the Fourth Circuit it cannot now be raised.[7]

B. Condemnation Of The "Seven-Four Plan" By The Court Of Appeals For The Fourth Circuit Is Consistent With The Principle Of "One Man-One Vote" And Constitutes Only One Of Many Lower Court Implementations Of This Established Principle And Does Not Constitute A Substantial Question That Should Be Reviewed By This Court

The simplicity of the principle laid down in what has been termed the "One Man — One Vote" test in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964) and its com-

---

[6]The questions presented to the Court of Appeals for the Fourth Circuit were stated in "VOTERS' " brief in that Court as follows:

"A. Is the Seven-Four Plan constitutional?

B. Are 'VOTERS' entitled to a stay of the pending election under the 'Seven-Four Plan'?

C. Are 'VOTERS' entitled to attorneys' fees?"

Appellants herein adopted those questions, stating in their brief before the Fourth Circuit:

"The three questions stated in Voters' brief correctly present the ultimate issues of the case."

[7] *Corrigan* v. *Buckley*, 271 U.S. 323, 330, 331, 46 S.Ct. 521, 523, 524, 70 L. Ed. 969, (1926)

"*** it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and *properly raised below*.***"

(Emphasis Added)

See also *Shelley* v. *Kraemer*, 334 U.S. 1, 8, 68 S. Ct. 836, 840.

panion cases, has restored representative government to the legislative bodies of this nation at an orderly and expeditious pace.[8]

Appellants admit that the only purpose of the "Seven-Four Plan" is to insure the election of persons familiar with the rural point of view. (Appellants' Jurisdictional Statement, P. 13).[9]

This Court has established the general principle that governs this case — that the balancing of rural and urban influence cannot be effected at the expense of equal representation.[10]

---

[8] The shift of population-based apportionment in the state legislatures of the United States has almost been completed, a Congressional Quarterly survey shows. While minor adjustments will still be required in a number of states, the latest count shows that 46 of the 50 legislatures will enter the 1966-67 elections with districts based substantially on the population principle.***

*** During the period from January 1, 1965 to June 1, 1966, 39 states took action — either legislative, judicial or otherwise — to reapportion one or both of their legislative bodies on a 'one-man, one-vote' basis for the next state legislative elections.

Congressional Quarterly Weekly Report, Vol. XXIV, No. 24, June 17, 1966

[9] The "Seven-Four Plan" provides, in effect, that 733 people in Blackwater District shall be guaranteed One (1) Councilman familiar with agriculture to represent their rural views, while the school, sanitation and road problems of the 29,048 persons living in Bayside shall only be guaranteed One (1) such specialized residential Councilman.

[10] *Davis* v. *Mann*, 377 U.S. 678, 692, 84 S. Ct. 1441, 1448 (1964):

"We also reject appellants' claim that the Virginia apportionment is sustainable as involving an attempt to balance urban and rural power in the legislature.***"

In *Reynolds* v. *Sims*, 377 U.S. 533, 580, 84 S.Ct. 1362, 1391 (1964) the principle that controls this case was established:

"*** Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again,

This Court can only accept review of cases of general applicability or for the purpose of producing uniformity in the interpretation of federal laws or constitutional guarantees.

Appellants admit that their plan, designed to protect rural interests at the expense of equal representation, is a "true hybrid" and is unique. Review of such a hybrid plan could only serve to create doubt and confusion regarding the thrust of "One Man — One Vote".[11]

---

people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1900's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing."

11 If the "Seven-Four Plan" is reviewable, it will stimulate the conception of other evasive plans. If valid, the Virginia Constitution could be amended to enlarge the House Of Delegates to 140 members, with one Delegate being assigned to every city and county in Virginia, regardless of size, and the gross malapportionment would be justified by allowing the voters of each political subdivision to vote for the resident Delegate of the other subdivisions. Such a scheme would return us to the urban-rural imbalance of malapportioned representation that has so recently been corrected.

CONCLUSION

For the above reasons, this appeal should be dismissed or affirmed.

Respectfully submitted,

CORNELIUS D. SCULLY AND HOWARD W. MARTIN,
J. E. CLAYTON DAVIS, ROLLAND D. WINTER

HENRY E. HOWELL, JR.,

HOWELL, ANNINOS & DAUGHERTY
808 Maritime Tower
Norfolk, Virginia 23510,

Counsel for Appellees

Dated November 21, 1966